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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE ADOPTION OF A.S. and O.S.,	)	
	)	
SCOTT SPENCER,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 52A04-0701-CV-5
	)	
JEROMY HILEMAN,	)	
	)	
Appellee-Petitioner.	)	
	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Judge
Cause No. 52C01-0505-AD-8
Cause No. 52C01-0505-AD-9

October 2, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Scott Spencer ("Father") appeals the trial court's order granting the petitions for adoption filed by Jeromy Hileman ("Stepfather"). We reverse.

Issue

Although Father raises five issues, we find the following issue dispositive: whether sufficient evidence supports the conclusion that Father has "knowingly failed, for a period of at least one (1) year, to provide for the care and support of [the children] when able to do so." *See* Appellant's App. at 7 (conclusion #1); Appellant's Br. at 12.

Facts and Procedural History

Heather Hileman[1] ("Mother") and Scott Spencer married in August 2000. On April 16, 2001, Mother gave birth to a son, A.S. On January 8, 2003, Mother filed a petition for dissolution of marriage. The next day, she gave birth to a second son, O.S.; Stepfather was present at the birth. Since January 2003, Mother, A.S., and O.S. have lived with Stepfather.

On March 17, 2003, Mother and Father's marriage was dissolved by the Miami Circuit Court. Pursuant to the dissolution decree, sole care, custody, and control of the couple's two children was placed with Mother; Father was granted visitation.[2] Appellant's App. at 9. Regarding support, the dissolution decree provided that Father

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[1] Mother married Stepfather on April 17, 2004. Tr. at 7.

[2] According to the dissolution decree, Father was granted visitation "pursuant to the Indiana Parenting Time Guidelines pending the further Order of this Court, to-wit: [Father] is permitted visitation on

> is currently unemployed or underemployed, having lost his employment previously reported at Timberland RV Company.[3] [Father] is deemed to have $210.00 as gross weekly income. [Father] should be and hereby is ordered to actively seek full-time employment and must report in writing any change in his employment and/or residential address to the attorney for [Mother] and the Clerk of this Court, within 48 hours of any change thereto.

Id. at 9-10. The court ordered Father to pay weekly child support of $61 and annual health care expenses of $458.64. *Id*. at 10-11. In addition, Father was to pay certain attorney fees and direct a tax refund toward the repayment of child support arrearage. *Id.*

By October 2003, Father was diagnosed with bi-polar disorder at Four County Mental Health Center. Respondent's Exh. B at 1, 3 (report of psychiatric status).[4] He has been prescribed mood stabilizers, anti-psychotics, and antidepressants, including Welbutrin XL, Risperdal, Depakote ER, Klonopin, Trilyptal, and Trazadone. App. at 4.

In the spring of 2004, Father worked at Deer Creek Pork for a few months. Tr. at 136. In June 2004, Mother filed a motion for modification of support and verified information in contempt. App. at 30. On July 22, 2004, Father made his first child support payment in the

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Wednesday each week from 5:00 p.m. to 7:00 p.m. at [Mother's] residence. [Mother] proposes to have another adult present while such visitations occur in her residence. [Father] has agreed that he will not push [Mother] while exercising visitation in [Mother's] home, and [Father] understands that should he push [Mother], [Mother] will seek an Order suspending [Father's] visitation opportunities with the minor children in [Mother's] home." Appellant's App. at 9.

[3] Father worked at Timberland for "maybe a month." Tr. at 136.

[4] Upon being asked when he was first diagnosed as bi-polar, Father testified, "I believe it was 2001 or 2002. Four Counties in Logansport." Tr. at 127. The materials provided on appeal do not contain medical records from Four County Counseling Center. Susan Robertson, Father's sister, testified that she believed he was diagnosed in 1998. *Id*. at 57. On October 9, 2006, Father's other sister, Stacey Dunham, testified that she thought he had been diagnosed "in the last three years, four years." *Id*. at 70.

amount of $420,[5] and the court held a hearing on Mother's motion. *Id.* at 31. On September 7, 2004, the court signed an agreed order, which found Father in direct contempt for failing to pay weekly support or medical expenses and for failing to report employment/residence changes within forty-eight hours. *Id*. at 23. The same agreement increased Father's support obligation to $84 and noted that Father "is seeking higher paying employment[.]" *Id.*

On October 8, 2004, another agreed order was entered, this one increasing Father's weekly support obligation to $98 and including the following provision:

> To insure that [Father] is taking prescribed medication(s) for his bi-polar condition, at the start of each visitation session he shall provide proof that he has the necessary medication(s) by showing [Mother] the bottle(s) of medicine which must clearly indicate the date the prescription for said medicine was last filled. If [Father] fails to provide such proof, he waives his right to visitation.

Id. at 21. Also on October 8, 2004, a "notice and order to income payor to withhold income" was approved, thus indicating that Father was working. *Id*. at 32. By October 15, 2004, Father was no longer employed. *Id*.

On November 18, 2004, Father presented at Wabash Valley Hospital with bi-polar symptoms and in need of medicine. Respondent's Exh. B.[6] Shortly thereafter, he was assigned a case manager, Michael Dailey, who has assisted him with keeping doctor's appointments, taking medications, and pursuing a claim for social security disability. *Id.*; Tr. at 99. By December 2004, Father had paid Mother's $350 attorney fees for time spent on her contempt proceeding, and a $20 "annual supp fee." App. at 33,14.

[5] Apparently, Father sold his truck to raise this money. Tr. at 142.

Dr. Iya Awramtchuk-Klim, a psychiatrist at the hospital, began treating Father in January 2005 and continued to do so throughout 2005 and into 2006. Respondent's Exh. A. at 8. Although Father's social security disability claim was initially denied on April 18, 2005, case manager Dailey is helping him through the appeals process, which if successful could result in back pay and support for his dependents. Tr. at 135. Father's case is in the "lawyer phase," meaning it has been prescreened and accepted by a firm, here The Shaw Group, that specializes in social security appeals. *Id.* at 99, 105-06, 134-35.

On May 9, 2005, Stepfather filed in the Miami Circuit Court a petition to adopt A.S. and O.S. App. at 1. In the latter part of 2005, Father filed a response and objection to the proposed adoptions and paid a $25 for "nons cpfe." App. at 14.

On October 13, 2005, Father filed a petition to cite Mother for contempt regarding visitation and a petition to modify support. App. at 33-34. On November 4, 2005, Father made his second child support payment, this one for $40. *Id*. at 14. Thereafter, Mother filed a motion for restriction of visitation rights and for contempt. *Id*. at 34. On December 1, 2005, the court held a hearing, found Mother in contempt, and ordered visitation to begin the weekend of December 2. On December 2, 2005, the court held a hearing that resulted in a December 22, 2005 order, in which the court found Father in contempt, ordered supervised visitation with paternal grandmother, set a hearing date for support issues, and ordered Father to "promptly begin looking for employment." *Id*. at 18-19, 35. On December 13, 2005, Father made his third child support payment, this one for $90. *Id*. at 14. Although he looked

[6] Obsessive-compulsive tendencies and leg and knee pains from prior surgeries were also noted.

for work through a temporary service, he did not find a job. Tr. at 137, 143-44.

In January 2006, Father made three child support payments: $100 on the 9th, $300 on the 17th, and $40 on the 23rd of the month. App. at 14. On February 27, 2006, Father made a $40 child support payment, the last one documented in the record. *Id*. On June 27, 2006, the court held a hearing regarding Father's October 13, 2005 motion for modification of support. *Id*. at 36. The order emanating from that hearing reiterated the contempt finding and restriction on visitation, found an arrearage in excess of $10,000, noted unpaid medical bills of $672.57, sentenced Father to ninety days in jail, restated the requirement that Father promptly begin looking for employment, ordered that Father's visitations be supervised by paternal grandmother, again ordered Father to provide proof of medication, and decreased his weekly child support amount to $27.50. *Id*. at 16-17, 36.

In August 2006, the Carroll Circuit Court entered an order stating that Father had pled guilty on June 14, 2006, to operating a motor vehicle after forfeiture of license for life, a class C felony. Petitioner's Exh. 4. Pursuant to that order, Father was to serve one year of the sentence on work release. *Id*. In conjunction with that proceeding, Father agreed to work faithfully at a suitable employment, make diligent efforts to obtain work, and realize that discharge from employment for cause may be considered a probation violation. *Id*.

On October 9, 2006, a hearing was held on Stepfather's petitions for adoption. On November 28, 2006, the court issued an order finding that Father's consent to the adoptions

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Respondent's Exh. B at 1.

was not required, terminating Father's parental rights, and granting the petitions for adoption. Appellant's App. at 1-7-A. Father appeals that order.

Discussion and Decision

Generally, a petition to adopt a minor child "may be granted only if written consent to adoption has been executed by ... [e]ach living parent of a child born in wedlock." Ind. Code § 31-19-9-1. However, consent to adoption is not required if for a period of at least one year, "[a] parent of a child in the custody of another person ... fails without justifiable cause to communicate significantly with the child when able to do so; or [ ] knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree." Ind. Code § 31-19-9-8(a)(2).

Father asserts that his consent was necessary for the adoption of his two sons. He likens his case to *Winters v. Talley*, 784 N.E.2d 1045, 1048 (Ind. Ct. App. 2003), in which we reversed an adoption without consent, and held that the evidence was insufficient to establish that a mentally ill mother, whose only source of income was Supplemental Security Income, was able to support her child yet failed to do so for one year. Father contends that his mental illness prevents him from being able to work and support his children. Stated otherwise, he challenges the sufficiency of the evidence to support Conclusion #1, which is that he has "knowingly failed, for a period of at least one (1) year, to provide for the care and support of [the children] *when able to do so* as required by law or judicial decree." Appellant's App. at 7 (emphasis added).

When reviewing the trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. *In re Adoption of Subzda*, 562 N.E.2d 745, 747 (Ind. Ct. App. 1990). We will not reweigh the evidence, but instead will examine the evidence most favorable to the trial court's decision together with reasonable inferences drawn therefrom, to determine whether sufficient evidence exists to sustain the decision. *Matter of Adoption of Marcum*, 436 N.E.2d 102, 103 (Ind. Ct. App. 1982). We note that a petitioner for adoption without parental consent bears the burden of proving the statutory criteria for dispensing with such consent in Indiana Code Section 31-19-9-8(a)(2) by clear, cogent, and indubitable evidence. *In re Adoption of Augustyniak*, 505 N.E.2d 868, 870 (Ind. Ct. App. 1987), *reh'g denied by* 508 N.E.2d 1307, *trans. denied*. If the evidence most favorable to the judgment clearly, cogently, and indubitably establishes one of the criteria for granting adoption without parental consent and, thereby, for the termination of parental rights without consent, we will affirm the judgment. *In re Adoption of Childers*, 441 N.E.2d 976, 978 (Ind. Ct. App. 1982). It is the appellant's burden to overcome the presumption that the trial court's decision is correct. *McElvain v. Hite*, 800 N.E.2d 947, 949 (Ind. Ct. App. 2003).

The court's Conclusion #1 appears to be based largely upon the court's Finding # 52, which states:

> The court finds that the evidence regarding [Father's] failure to provide for the care and support [of] the children is clear and convincing, that [Father] had a duty to support and knew of his obligation. Although he claims he suffers from various maladies which prevent his working, he is able to be employed and has actually been employed at various times and places over the past four years. While employed, he has failed to pay support. He leaves employment

> by failing to show up. He is presently employed by his father to pay attorney fees, but not to pay support. He has entered into an agreement to avoid a DOC commitment by participating in work release, presumably by being employed.

App. at 7.

Finding #52 seems to summarize many of the order's other findings; unfortunately, support for these other findings has proven elusive. We include a sampling of the findings that are either incorrect in part or are incomplete to the point of being misleading.

> #22. Dr. Klim testified that all of Father's symptoms were based upon self-reporting and that Father "had not been subjected to any psychological testing or evaluations."

The inference with which one is left is that the diagnosis is faulty. What the finding does not state is that "psychiatric evaluation is based on interview of the patient," which was done. Dr. Klim's Dep. at 19. The finding also does not include Dr. Klim's explanation that further testing is done only if reliability is questioned, and it was not in Father's case. *Id*. Dr. Klim further opined that Father "did not come across as a malingerer," and she "had no evidence that he was faking." *Id*. at 20, 12. Likewise, Mr. Dailey concurred with the bi-polar diagnosis. Tr. at 105.

> #23. "… [Father] reported that he worked until September 4, 2005."

The finding cites page 20 of Dr. Klim's deposition. Her actual testimony was that Father "worked until Sept. 4th, *I assume, 2005*." Respondent's Exh. A at 20 (emphasis added). This assumption is undercut by a report of psychiatric status that indicates Fall 2004 was the "date the illness caused the patient to stop working." Respondent's Exh. B at 1; *see*

also Tr. at 139 (Father's testimony: "I don't think I worked in 2005" or 2006). Indeed, Father began the disability claims process in November 2004. *Id*. at 134.

> #27. "At the trial on the adoption, [Father] testified that he had borrowed money from his father to hire an attorney to represent him in the adoption proceedings. He is paying back the loan by working for his father without receiving compensation and does mowing for him."

Father did not testify that he "borrowed money from his father." Rather, the evidence is that when the paternal grandparents learned that access to their grandsons was jeopardized by the petitions for adoption, the grandparents chose to pay an attorney to fight the adoption. *See* Tr. at 83 (when questioned about choosing to pay the attorney fees to fight the adoption rather than paying Father's child support obligation, Father's stepmother testified that she and paternal grandfather "would like to see the children remain Spencers."). Moreover, the uncompensated lawn mowing is done on a riding mower for approximately ten hours per week as a way to "pay back" his father. There is no indication when Father started doing this or how long it has continued.

> #28. "[Father] testified that he had worked at Timberland RV, Deer Creek for three months in 2004, has worked through temporary services. He believed that he had last worked in December 2005. The wage withholding order noted above would also indicate that at one time he worked for Dynamic Corporation."

Our review of the transcript reveals that Father did look for a job at temporary services, but did not find one. *Id.* at 143. We cannot find support for the assertion that he worked in December 2005 – despite the following misleading question asked on cross-

examination: "Have you worked since December 22nd, 2005?" *Id*. As for Dynamic Corporation, one week after the October 8, 2004 "notice and order to income payor to withhold income" was approved, Father was no longer employed. App. at 32.

> #38. Father's reasons for losing jobs were "quitting or failing to show up for work."

Father testified that his failure to show up for work was due to his bi-polar condition. Tr. at 137. Dr. Klim testified that Father's bipolar disorder impaired his capacity to maintain steady employment. Dep. at 12. Mr. Dailey concurred in the adverse effect Father's bi-polar has on his ability to work and provide income for his family. Tr. at 113. We have located no evidence that Father left jobs due to laziness, irresponsibility, or some other pejorative reason, which is the implication left by the incomplete finding.

> #39. Father "was at a loss as to explain how on days he is supposed to work, he could not put forth the same effort and energy" he used when he had visitation.

This finding does not note the obvious distinction between maintaining full-time employment and exercising brief, often supervised visitation.

> #40. "During the period of March 12, 2003 through November 3, 2004, [Father] was able to work and was working. During that same period, [Father] failed to pay child support."

The record reveals that Father was unemployed in March 2003. The first indication we can find that Father resumed employment was in the spring of 2004, when he worked at

Deer Creek Pork for a few months. Tr. at 136. Father made a $420 child support payment in July. The record is unclear regarding the start date or duration of his next job. Again, the evidence does show that one week after the October 8, 2004 "notice and order to income payor to withhold income" was approved, Father was no longer employed. App. at 32.

> #41. "Between July 23, 2004 and November 4, 2005, [Father] failed to pay child support. By his own testimony, he stated that he believed the last time he worked was in December 2005. The court finds that [Father] failed to pay support for two separate periods each in excess of 15 months."

This finding begs the question of Father's ability to provide support. We have not located evidence that Father was regularly working between July 23, 2004 and November 4, 2005, let alone in December 2005.

> #42. "In the same period of time, 2004 to the present, [Father] has found the resources to hire counsel to represent him in contempt proceedings, represent him in his claim for Social Security benefits, and represent him in adoption proceedings."

The record actually shows that Father was referred to a group that specializes in social security claims. There is no indication as to a retainer being paid; indeed, there is no evidence that Father's case was not accepted on a contingency basis. Tr. at 105. As noted *supra*, the "resources" for the adoption case materialized when the paternal grandparents learned that access to their grandsons was in jeopardy.

> #44. "In December 2005, this Court, under the dissolution cause, ordered [Father] to find employment. [Father] is able to work and is currently

> working for his father. However, his incentive is not to pay support for [his children] but to work off his debt for his attorney fees in the adoption matter."

The evidence was that Father was cutting lawns at rental houses for his father. He was riding the mower approximately ten hours per week and receiving no pay for his efforts. There was no indication as to how many weeks he had done this.

> #45. "[Father] testified at the final adoption hearing that in response to the Court's Order from the December 2, 2005 hearing, he almost made himself available to do 'factory work' through a temporary service agency."

Father actual testimony was: "I've looked at both the temporary places. I was even willing to go to a factory."

> #46. This finding notes that Father "indicated he will be employed so as to participate in work release and avoid a commitment to the Department of Corrections [for his sentence for felony driving while suspended]. Again his motivation is to avoid a penalty, but he is unable to motivate himself to support his children."

This finding does not indicate that Father found a job, let alone that he had the ability to support his children. It shows his intention to be employed.

> #48. Father's "Exhibit C indicates that he has not purchased any of his medicines since April 14, 2006."

This provides no evidence regarding the duration of Father's prescriptions, let alone whether he receives samples from treating physicians.

In summary, within the material before us, there is no evidence that Father was able to provide monetary care and support for his children, but knowingly failed to do so for a period of at least one year. The work history that we can glean from the record is scant. The sporadic child support payments seem to correlate with the times Father was briefly employed. This would lead to the conclusion that Father was actually providing support when able. The only professional opinions are that Father's bi-polar disorder impairs his ability to maintain steady employment (despite Father's intentions/attempts), and that he is not "faking" a serious mental illness that requires lifelong treatment with strong medications.

There is no evidence that Father has been earning money, but spending it on frivolous items, trips, addictions, etc., rather than putting it toward child support payments. *Cf. Irvin v. Hood*, 712 N.E.2d 1012, 1014 (Ind. Ct. App. 1999) (evidence that father was earning $320 per week for a year and able to travel abroad for two months to play rugby showed he was financially able to support child). To the contrary, the evidence reveals that Father has little money, lives in a mobile home owned by his current wife who works and supports them, has his medications covered by Medicaid, and is cooperating with services that have been provided to help him pursue a social security disability claim. We cannot say that the evidence most favorable to the judgment clearly, cogently, and *indubitably* [7] establishes that for a period of at least one year Father "knowingly fail[ed] to provide for the care and support

[7] Indubitably means: unquestionably, without a doubt, definitely, absolutely. This level of certainty is necessary and proper where a parent's right to parent may forever be extinguished. At the same time, the best interest of the children is obviously of paramount concern. However, the best interests analysis does not occur until *after* the consent inquiry is resolved. *See McElvain*, 800 N.E.2d at 950 n.2; *see also In re Adoption of J.P.*, 713 N.E.2d 873 (Ind. Ct. App. 1999).

of the child[ren] *when able to do so* as required by law or judicial decree." Ind. Code § 31-19-9-8(a)(2) (emphasis added). That is, the evidence at this point[8] is insufficient to negate the consent requirement.

In its Finding #51, the court found the evidence regarding Father's visitation/communication ambiguous and not convincing, thus insufficient to negate the consent requirement. App. at 7. Absent a showing of at least one of the criteria in Indiana Code Section 31-19-9-8(a)(2), we cannot in good conscience affirm the judgment. This is not to say that ultimately petitions for adoption will not be granted. At this juncture, however, we do not have sufficient evidence from which we can confidently say that termination of Father's rights and, in turn, adoption of his sons without his consent, is proper. Accordingly, we are compelled to reverse. *See McElvain*, 800 N.E.2d at 949-50 (reversing order granting stepfather's adoption without consent where there was no evidence that father was able to pay support after he lost his unemployment benefits; court erred in finding that father was able to maintain support payments); *see also Augustyniak*, 508 N.E.2d at 1308 (denying rehearing, and explaining: "A petitioner for adoption must show that the non-custodial parent had the ability to make the payments which he failed to make. That ability

[8] It is conceivable that in the future Stepfather could demonstrate that Father knowingly failed to provide care and support when able to so. To that end, the following information could be particularly helpful for a court attempting to make a correct, fully informed decision: a work history log for Father clearly cataloguing the dates, rates, hours, and duration of his employment since the dissolution and through the present; a probation status report to check on Father's work release record; Father's complete records from Four County Counseling Center; Father's tax records from 2003 forward; an update on Father's appeal of his social security claim, including whether A.S. and O.S. would receive direct benefit if Father is successful, and whether the appeal was done on a contingency basis; and, an independent psychosocial exam of Father to corroborate/disprove his diagnoses and his ability to work.

cannot be adequately shown by proof of income standing alone. To determine that ability, it is necessary to consider the totality of the circumstances. In addition to income, it is necessary to consider whether that income is steady or sporadic and what the non-custodial parent's necessary and reasonable expenses were during the period in question. There may be a level of income so high that, standing alone, it would be sufficient to show the ability to make child support payments. But, that level was not reached here.").

In reaching our decision, we note that we do not envy trial courts charged with the duty of deciding adoption-without-consent cases. We recognize the constraints and limitations under which trial courts regularly labor as they attempt to apply the law to sort out myriad, imperfect situations. Even with the luxury of time, the appellate courts struggle to reach consensus in these complicated, delicate matters. *See, e.g.*, *Winters*, 784 N.E.2d 1045 (case includes a lengthy dissent; our supreme court originally granted but eventually dismissed transfer of the case). Indeed, we have the utmost respect for the judgment of the trial court, and commend the judge for the admirable job trying to reconcile irreconcilable interests.[9] Furthermore, we are acutely sensitive to the financial ramifications that a reversal may cause these particular parties. We are also cognizant of our decision's costs in terms of finality. Despite these grave reservations, we cannot affirm.

Reversed.

DARDEN, J., and MAY, J., concur.

[9] Unfortunately, the court was confronted with an incomplete record and, we suspect, with some overzealous/misleading proposed findings. *See* Tr. at 168 (court requested proposed findings, conclusions, and supporting memorandum from each party).